Supreme Court, U.S.
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No. 98 838

In the

# Supreme Court of the United States

OCTOBER TERM, 1998

RAYMOND POLANCO,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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34 pp

## QUESTIONS PRESENTED

1. Whether an unanticipated "road rage" murder of an innocent motorist can be treated as part of a RICO "pattern of racketeering activity" by a gun trafficking enterprise, where the murder was committed by a prospective purchaser of the gun.

2. Can a federal appellate court, in affirming the relationship of a RICO defendant's participation in a murder to that defendant's RICO gun trafficking enterprise, base its affirmance not on an independent review of the facts, but upon an assertion that

   (a) a "reasonable" or "rational" jury "could find" or "could easily conclude" that such a RICO-type relationship existed even though

   (b) the jury was not instructed as to the RICO standards for determining such a relationship, and the jury made no special findings as to such a relationship.

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## PETITION FOR WRIT OF CERTIORARI

The Petitioner, Raymond Polanco, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this proceeding.

### OPINION BELOW

The Second Circuit issued its judgment and opinion on May 28, 1998. The opinion is reported at 145 F.3d 536. It is reprinted in the Appendix hereto, (A-3). No opinion was issued by the trial court, the United States District Court for the Eastern District of New York.

## JURISDICTION

The Second Circuit issued its judgment and opinion on May 28, 1998. On July 22, 1988, the Second Circuit denied Petitioner's timely filed petition for rehearing, as well as his Suggestion of Rehearing *in Banc*. See A-1. Thereafter, on October 16, 1998, Associate Justice Ginsburg extended the time for filing this Petition for Certiorari to and including November 19, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

**Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c), (d):**

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

**RICO, 18 U.S.C. § 1959(a)(1):**

> (a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering

activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished —

(1) for murder, by death or life imprisonment, or a fine under this title, or both; and for kidnapping, by imprisonment for any term of years or for life, or a fine under this title, or both.

## STATEMENT OF THE CASE

In 1996, Petitioner Polanco was arrested on charges of selling and distributing narcotics. Soon thereafter came a superseding 13-count indictment. 2d Cir. App. A-23-35. The Petitioner was the only named defendant.

The indictment asserted that the Petitioner was the head of a criminal organization that the indictment referred to either as the "Polanco Organization" or the "Polanco Enterprise." This was said to be a group of individuals who allegedly ran a crack cocaine and gun distribution program in the Gowanus Housing Project in downtown Brooklyn. The purpose of this Organization, said the indictment, was to "make money for RAYMOND POLANCO and other members," a goal to be accomplished by "narcotics trafficking, firearms trafficking, murder, and other crimes."

The Polanco group was said to consist of "more than five [unnamed] members," including members "specifically employed to rob and murder rival drug dealers in the Project so that Polanco could monopolize the drug trade within the Project." (A-5). But none of such members was named or charged in this indictment.

In addition to selling crack cocaine in the Project, the Polanco Enterprise allegedly sold and distributed guns. In particular, it was claimed that Petitioner sold handguns and machine guns to Lenin Sepulveda, the leader of a gang known as the Red Top Crew (composed primarily of "males of Dominican descent"). The Red Top Crew was shown to be a drug trafficking "Enterprise" that operated independently and in a different section of New York City (the Bronx). Thus it was not in competition with the Polanco Enterprise (A-5). As summarized by the Second Circuit, Polanco was charged with committing 13 racketeering offenses (see A-5-6):

> **(A) Counts 1, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 (the so-called Polanco Enterprise counts):** These counts charged Polanco with committing various illegal acts in connection with his operation of the Polanco Enterprise, including engaging in a continuing criminal enterprise (CCE) in violation of 21 U.S.C. § 848, conspiring to distribute narcotics in violation of 21 U.S.C. § 846, and conducting the affairs of an enterprise in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c).
>
> **(B) Counts 2 and 3 (the so-called Red Top Crew counts):** Polanco was charged with murdering one David Cargil with a machine gun for the purpose of maintaining or increasing his position in the Red Top Crew "enterprise," in violation of 18 U.S.C. § 924(c) and 1959.

Following a trial in the Eastern District of New York, the jury returned a guilty verdict on all counts except Counts 6 and 7, two of the Polanco Enterprise counts. The court imposed sentences of (a) 5 consecutive life sentences on Counts 1, 2, 4, 8 and 9; (b) a consecutive 10-year sentence on Count 5; (c) consecutive 20-year sentences on Counts 10, 11, 12 and 13; and (d) a consecutive 30-year sentence on Count

3. In sum, the sentences totaled 5 consecutive life terms plus 1440 months. 2d Cir. App. A-22.

In addition, the court ordered a supervised release for a term of 5 years on Counts 1 to 4, and three years on Count 5. The terms are to run consecutively for a total of 53 years. Petitioner also was ordered to pay a "special assessment of $550.00 due immediately," pursuant to 18 U.S.C. § 3013 (which allows a $50 special assessment on each conviction). 2d Cir. App. A-22.

On the ensuing appeal, the Second Circuit reversed Petitioner's convictions and sentences on Counts 2 and 3, which had charged that Petitioner, together with others, had used a machine gun to murder David Cargil "for the purpose of maintaining and increasing [Petitioner's] position in the [Red Top Crew] Enterprise." The court found that the Government had failed to prove Petitioner had any position in that "enterprise." Therefore, the court held, Petitioner could not have murdered David Cargil in order to maintain or increase his position in the Red Top Crew enterprise (A-9).

Moreover, the Second Circuit found no evidence that Petitioner was ever involved with the Red Top Crew's drug trafficking. He "did not buy drugs from, sell drugs to, or distribute drugs for, the Red Top Crew. While the evidence demonstrates that Polanco sold guns to the Red Top Crew, the evidence also clearly shows that Polanco's relationship with the Red Top Crew did not exceed a vendor-vendee relationship, and that Polanco had no role in determining how or why the Red Top Crew would use the guns" (A-8). The Second Circuit accordingly reversed Petitioner's conviction on Count 2, as well as his derivative conviction on Count 3 (for having utilized a machine gun to murder Cargil in violation of 18 U.S.C. § 924(c)).

The Second Circuit then addressed Petitioner's challenges to his convictions on the remaining nine "Polanco Enterprise counts." The court first focused on Counts 8 and 9. Petitioner had been convicted under Count 8 for engaging in a conspiracy to distribute cocaine base, in violation of 21 U.S.C. § 846. He had also been convicted, under Count 9, for engaging in a continuing criminal enterprise (CCE) involving hard narcotics, in violation of 21 U.S.C. § 848. But, the court found, the alleged § 848 or CCE enterprise (the Polanco Enterprise) was the same enterprise as the alleged § 846 conspiracy.

The Government conceded that convicting Petitioner on both Counts 8 and 9 would violate the Double Jeopardy Clause of the Fifth Amendment. The Second Circuit agreed, citing this Court's decision in *Rutledge v. United States*, 517 U.S. 292, 300 (1996)("CCE and conspiracy are insufficiently distinct to justify a finding that Congress intended to allow punishments for both when they rest on the same activity").

The Second Circuit then turned to Petitioner's contention that his Count 1 conviction (his conviction for having operated the Polanco Enterprise in violation of 18 U.S.C. § 1962(c)) should be reversed. Count 1 charged that Petitioner had committed seven predicate racketeering acts while operating his drug and gun distribution Enterprise. The fourth such racketeering act was alleged to be a conspiracy to murder David Cargil, as well as the actual murder of Cargil. Petitioner's complaint was that Cargil's murder was not related to his operation of the Polanco Enterprise and thus could not be considered as a RICO predicate act of the Polanco Enterprise.

The Cargil murder was indeed the dramatic centerpiece of Petitioner's trial. As the trial judge said in a pretrial memorandum, "media attention has, in the past, focused on this case because of the public's interest in the murder of David Cargil, and will likely continue." 2d Cir. App. A-80. And to guard against any prejudicial effect stemming from

such public and media attention, the trial judge ordered that the jury be kept anonymous, no names, no addresses. *Id.*

The Cargil murder thus merits some detailed description. And the description here is taken exclusively from the perspective of the Second Circuit, a perspective that views the evidence in the light most favorable to the Government (A-4). To wit:

1. The Polanco Enterprise not only sold crack in the Gowanus Housing Project, but it also sold and distributed guns.

2. One of Petitioner's gun customers was Lenin Sepulveda, the leader of the Red Top Crew gang that sold and distributed drugs in the Bronx, an operation that did not compete with Polanco's drug sales and distribution in the Gowanus Housing Project.

3. Each time Sepulveda purchased a machine gun from Polanco, Sepulveda would test the gun to be sure that it was fully automatic before he would pay Polanco. The trial testimony (Tr. 993) indicated that Sepulveda in the past had tested such guns by going onto a roof and firing each weapon, presumably into the air, not at a person. If a gun passed this test, Sepulveda would pay as much as $2,500 for each gun.

4. During one such gun sale, Sepulveda told Polanco "let's go to the highway [and] as soon as we get [to] the highway, we will test it [the machine gun] out."

5. On this occasion, Polanco drove Sepulveda's Buick north through Manhattan toward the 57th Street entrance to the Westside highway. Sepulveda was sitting in the front passenger seat, holding the Uzi machine gun. Just ahead of the Buick was a BMW being driven by Sepulveda's brother, who was also a Red Top Crew member.

6. As the two cars reached the 57th Street entrance, a jeep pickup truck being driven by David Cargil went through a red light, and then cut off and almost hit the BMW on the highway ramp. Cargil, as the Second Circuit noted, was a totally "innocent motorist," in that he had no connection whatever with the Polanco Enterprise, or with the Red Top Crew, or with any other crime family or group.

7. The BMW slowed down, pulled up to the Buick, and the driver said to Sepulveda that the driver of the jeep was "crazy." Sepulveda replied, "what do you want to do? You know, light him up," meaning shoot the driver.

8. As Polanco speeded up to catch the jeep, Sepulveda found that the machine gun didn't work properly. Sepulveda then held the steering wheel while Polanco fixed the gun; the same routine ensued when Sepulveda found again that the gun would not shoot. Finally, Polanco pulled the Buick alongside the jeep. This time, the gun worked. Sepulveda pointed the gun outside the window at the jeep's driver, Cargil. The jeep was sprayed with gunfire. Cargil was killed. And, according to Sepulveda's trial testimony, Polanco then stated, "Shit, told you it works." Tr. 980. The Brief of the United States before the Second Circuit, p. 19, gratuitously described that statement of Polanco as having been uttered "triumphantly."

9. As a result of this shooting, the sale of the machine gun to Sepulveda was consummated. Thereafter, Petitioner continued to sell to Sepulveda machine guns, silencers and ammunition for use by the Red Top Crew.

The killing of David Cargil thus was Sepulveda's act of retaliation for Cargil's careless traffic infraction. It was a spontaneous, unplanned, and isolated occurrence, having nothing to do with the distribution or selling of drugs, or with any gun trafficking. Nor was Cargil in any way associated with organized crime. In all RICO respects, Cargil was a total stranger, a reckless driver who inadvertently chanced to come close to hitting one of Sepulveda's automobiles.

Nonetheless, the Petitioner—in his capacity as head of the Polanco Organization—was convicted of (a) conspiring with others to murder Cargil, and (b) knowingly and intentionally murdering Cargil, all in violation of New York penal laws. In RICO terms, this Cargil killing was viewed in the indictment as one of the events in the "pattern of racketeering activity" and thus triggering the RICO sanctions. *See* 18 U.S.C. § 1961(1) and 1961(5).

The Second Circuit affirmed Petitioner's conviction, under Count 1, of participating in the conspiracy to murder, and the murder of Cargil. It accepted the proposition that predicate acts must be related to each other ("horizontal" relatedness), and they must be related to the enterprise ("vertical" relatedness). The court also stated that a predicate act is "related" to an enterprise if it is "related to the activities of that enterprise." And it added that "A predicate act is related to a different predicate act if each predicate act is related to the enterprise" (A-11).

Using those propositions, the Second Circuit held that "a rational jury could find that Polanco's participation in Cargil's murder was related to Polanco's RICO enterprise." *Id.* The court felt that the evidence showed that Polanco, as head of his Enterprise, sold guns to Sepulveda and the Red Top Crew in order to earn money for the Polanco Enterprise and to cultivate a closer relationship with the Red Top Crew, perhaps to the point where the Red Top Crew might join forces with Polanco. Thus, concluded the court, "each machine gun sale to Sepulveda, including the sale of the machine gun used to murder Cargil, was related to Polanco's RICO enterprise." *Id.*

Additionally, the court stated that "A reasonable jury could easily conclude that shooting Cargil was a necessary precedent to consummating the gun sale, and that Cargil's murder was part and parcel of the gun sale. Accordingly, we find that Polanco's participation in Cargil's murder was related to the weapons distribution activities of Polanco's

RICO enterprise and the evidence thereof certainly was relevant to Polanco's RICO conviction." *Id.*

At the same time, as above indicated, the Second Circuit had reversed Polanco's conviction, under Count 2, for having murdered Cargil for the purpose of "maintaining or increasing Polanco's position in the Red Top Crew." That conviction was reversed because Polanco was not a member of, nor held any position in, the Red Top Crew.

The Second Circuit rejected all other arguments of Petitioner. The court's final judgment thus became (a) a reversal of Polanco's convictions and sentences on Counts 2 and 3; (b) a vacation of his conviction on Count 8; and (c) an affirmation of the convictions and sentences "in all other respects" (A-14). It should be added that, in the course of denying Polanco's petition for rehearing, the Second Circuit rejected his plea that the case be remanded to the district court for resentencing in light of the Second Circuit's voiding of the convictions on Counts 2, 3 and 8.

## REASONS FOR GRANTING THE WRIT

### 1. The Second Circuit has created an important RICO question as to what constitutes an "isolated" or "sporadic" act that is not a part of a "pattern of racketeering activity."

The sole question in this case is whether Petitioner's life sentence conviction under Count 1, for having conspired to murder and then murdered David Cargil, can be upheld on the theory that this murder was part of the RICO "pattern of racketeering activity" ascribable to Polanco's gun-trafficking enterprise.

This Court has established that a RICO "pattern of racketeering activity" must be composed of something more than "sporadic activities." Each predicate activity, to be a part of a pattern, must be "related" to all other predicate activities, so that they amount to or pose a threat of "continued" criminal activity. "It is this factor of continuity plus relationship which combines to produce a pattern." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496, n. 14 (1985); *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 238-239 (1989).

But the "limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods [of proof of those factors] cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a 'pattern of racketeering activity' exists. The development of these concepts must await future cases." *H.J. Inc.*, *supra*, 243. This is such a case.

Petitioner's position is that the Cargil murder was a very unique and isolated form of activity. The shooting of Cargil was not the act of Petitioner. It was a "road rage" reaction of the gun purchaser, Sepulveda, to Cargil's bad driving skills on the night in question, including Cargil's running though a red light and barely missing a crash into one of Sepulveda's cars. By any definition, this unfortunate killing was a unique event, unlike any of the other gun-trafficking events that constituted Polanco's gun-selling "pattern of racketeering activity." In short, this murder should be classified as an "isolated event," an event that RICO was not designed to deter. *Sedima*, *supra*, at 496, n. 14.

Moreover, some of the Second Circuit's statements respecting the relationship of Polanco's enterprise to the sale and testing of the weapon used by Sepulveda to kill Cargil are refuted by its own findings under Count 2. That count has charged Polanco with the murder of Cargil in order to maintain his position in the Red Top Crew. In reversing this Count 2 position, the Second Circuit made several findings

that seem somewhat inconsistent with its findings respecting the Count 1 conviction. To wit:

| *Findings as to Count 1* | *Findings as to Count 2* |
|---|---|
| 1. Each machine gun sale to Sepulveda, including the sale of the machine gun used to murder Cargil, was related to Polanco's RICO enterprise (A-11). | 1. The evidence clearly shows that Polanco's relationship with the Red Top Crew "did not exceed a vendor-vendee relationship, and that Polanco had no role in determining how or why the Red Top Crew would use the guns" (A-8). |
| 2. Polanco's "participation in Cargil's murder was related to the weapons distribution activities of Polanco's RICO enterprise" (A-11). | 2. Sepulveda testified that he was the person who decided what was going to be done with each gun purchased from Polanco (A-8-9). |

Nonetheless, the Second Circuit held that Polanco was guilty of the Count 1 charge that he killed Cargil as a part of his participation in a RICO pattern of racketeering activity. The court accepted this Court's *Sedima-H.J. Inc.* definition of a RICO "pattern of racketeering activity." But it found that the Cargil murder was an integral part of such a pattern. It did so primarily by making two assumptions:

> 1. "[A] rational jury could find that Polanco's participation in Cargil's murder was related to Polanco's RICO enterprise" (A-11).

> 2. "A reasonable jury could easily conclude that shooting Cargil was a necessary precedent to consummating the gun sale, and that Cargil's murder was part and parcel of the gun sale [and the court finds] that Polanco's participation in Cargil's murder was related to the weapons distribution activities of Polanco's RICO enterprise" (A-11-12).

But query whether Petitioner's life sentence for the murder of Cargil should rest on two speculative assumptions that a reasonable or rational jury "could find" or "could easily conclude" that the murder was related to Polanco's RICO gun distribution business. The jury was never instructed as to this statutory requirement. Nor did the jury make any special finding regarding this vital link between the enterprise and the Cargil murder. Such assumptions should not be a substitute for facts from which an appellate court can determine whether the link was proved beyond a reasonable doubt.

Thus are drawn the opposing views as to whether the Cargil murder incident was a part of the RICO pattern of racketeering activities. And the Government will doubtless add additional arguments supporting the Second Circuit's analysis. All of which will make for a full debate in this Court as to what constitutes an "isolated" incident that falls outside any RICO pattern of racketeering activities.

Supplementing the appropriateness of granting certiorari to decide that statutory problem of definition is the fact that the Petitioner has received a life sentence for the Cargil murder. But he did not pull the trigger on the gun that shot Cargil. That was the act of Sepulveda, who admitted that the on-the-spot decision to shoot Cargil was not ascribable to Petitioner. But can such a "road rage" event be a substitute for a shooting directly related to Polanco's "pattern of racketeering activity"?

**2. Certiorari should be granted on this one interpretive issue despite the fact that Petitioner received life sentences on other counts of the indictment.**

In this case, Petitioner originally received five consecutive life sentences, plus 1440 months. The Second Circuit reversed several of the counts on which life sentences had been imposed. But life sentences remain in effect for at least two other counts of the indictment, other than the Count 1 conviction that is the subject of this petition.

But review of this one life sentence conviction should not be avoided because of the concurrent sentence doctrine. On each conviction for which a life sentence was imposed, the district court also imposed a $50 assessment, pursuant to 18 U.S.C. § 3013. That statute permits a monetary charge "on any person convicted of an offense against the United States." See *Ray v. United States*, 481 U.S. 736, 737 (1987). Such an assessment was imposed on Petitioner's conviction for the RICO offense here in issue. Such an assessment is enough to preclude use of the concurrent sentence doctrine. See e.g., *United States v. Robinson*, 149 F.3d 1172, 1998 WL 252739 (4th Cir. 1998).

And should this Court grant certiorari and should this Court reverse the decision below as respects the Cargil murder, Petitioner would then request that the case be remanded to the district court for resentencing.

## CONCLUSION

For all the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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November 1998

# APPENDIX

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

**UNITED STATES COURT HOUSE**
**40 FOLEY SQUARE**
**NEW YORK 10007**

**CAROLYN CLARK CAMPBELL**
**CLERK**

UNITED STATES
COURT OF APPEALS
FILED
JUL 22 1998
CAROLYN CLARK
CAMPBELL, CLERK
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-second day of July, one thousand nine hundred and ninety-eight.

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USA

Appellee,

v

Dkt No: 97-1396

Polanco

Defendant-Appellant.

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A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Raymond Polanco.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

**FOR THE COURT**

CAROLYN CLARK CAMPBELL,
Clerk

By: /s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 1997

(Argued March 9, 1998 Decided May 28, 1998)

Docket No. 97-1396

UNITED STATES OF AMERICA,

*Appellee*,

v.

RAYMOND POLANCO,

*Defendant-Appellant*.

Before: WALKER, OAKES, and MAGILL,[1] Circuit Judges.

The defendant was convicted in the United States District Court for the Eastern District of New York (Sterling Johnson, *District Judge*) of various crimes arising from his operation of a drug and gun trafficking enterprise. The defendant raises numerous claims of error on appeal, contending that the government failed to prove an essential element of his conviction under 18 U.S.C. § 1959 for committing murder for the purpose of increasing or maintaining his position in a criminal enterprise; that his convictions for conspiracy under 21 U.S.C. § 846 and for engaging in a continuing criminal enterprise under 21 U.S.C. § 848 violated the Double Jeopardy Clause; that he was unfairly prejudiced by the introduction of evidence of a murder that was not related to his criminal enterprise; and that his convictions were not supported by the evidence.

[1] The Honorable Frank Magill, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

The defendant's convictions are affirmed in part, reversed in part, and vacated in part.

HERALD PRICE FAHRINGER (LIPSITZ, GREEN, FAHRINGER, ROLL, SALISBURY & CAMBRIA), New York, New York, *for Appellant.*

PAUL WEINSTEIN, Assistant United States Attorney (Zachary W. Carter, United States Attorney), New York, New York, *for Appellee.*

MAGILL, Circuit Judge:

Raymond Polanco appeals his convictions on various federal offenses related to his operation of a drug and gun trafficking enterprise. Polanco contends that: (1) the government failed to prove an essential element of his conviction for committing murder for the purpose of increasing or maintaining his position in a criminal enterprise under 18 U.S.C. § 1959; (2) his convictions for conspiracy under 21 U.S.C. § 846 and engaging in a continuing criminal enterprise under 21 U.S.C. § 848 violated the Double Jeopardy Clause; (3) he was unfairly prejudiced by the introduction of evidence of a murder that was not related to his criminal enterprise; and (4) his convictions were not supported by the evidence. We agree only with Polanco's first two contentions and, thus, affirm in part, reverse in part, and vacate in part.

## I.

Viewing the evidence in the light most favorable to the verdict, appellant Raymond Polanco ran a narcotics and gun distribution organization in Brooklyn, New York (the Polanco Enterprise). The Polanco Enterprise consisted of more than five members who worked under Polanco's direction to distribute crack cocaine in the Gowanus Housing

Project (the Project), a public housing complex located in Brooklyn. The Polanco Enterprise also included members specifically employed to rob and murder rival drug dealers in the Project so that Polanco could monopolize the drug trade within the Project. To this end, Polanco orchestrated the murder of Antonio Rivera and the attempted murder of Carlos Moreno, both of whom were Polanco's rivals.

In addition to selling crack cocaine in the Project, the Polanco Enterprise sold and distributed guns. Polanco sold guns to Lenin Sepulveda, the leader of a gang known as the Red Top Crew that distributed drugs in the Bronx, New York. Polanco supplied the Red Top Crew with handguns and machine guns. Each time Sepulveda purchased a machine gun from Polanco, Sepulveda would test the gun to verify that it was fully automatic before he would pay Polanco. During one machine gun sale, Sepulveda told Polanco "let's go to the highway [and] as soon as we get [to] the highway, we will test it [(the machine gun)] out." Tr. of Trial at 976 (Feb. 10, 1997). While Polanco drove Sepulveda to the highway, an innocent motorist, David Cargil, ran a red light and almost hit the car driven by Sepulveda's brother, which was in front of Polanco's car. In retaliation, Sepulveda decided to "test" the gun by killing Cargil. Polanco sped after Cargil so that Sepulveda could take a clear shot. When the machine gun did not fire, Polanco attempted to fix the gun. After the machine gun jammed a second time, Sepulveda told Polanco that Sepulveda did not want the gun because the gun did not work. Polanco responded "yes, it works" and, this time, successfully repaired the gun. Sepulveda consequently shot and killed Cargil, enabling Polanco to consummate the sale.

On August 1, 1996, a thirteen-count indictment was issued naming Polanco as the sole defendant. In counts one, four, and five through thirteen (the Polanco Enterprise counts), the government charged Polanco with committing various illegal acts in connection with his operation of the Polanco Enterprise, including engaging in a continuing criminal enterprise (CCE) in violation of 21 U.S.C. § 848,

conspiring to distribute narcotics in violation of 21 U.S.C. § 846, and conducting the affairs of an enterprise in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c). In counts two and three (the Red Top Crew counts), the government charged Polanco with murdering Cargil with a machine gun for the purpose of maintaining or increasing his position in the Red Top Crew in violation of 18 U.S.C. §§ 924(c) and 1959.

The jury returned a verdict of guilty on all counts except two of the Polanco Enterprise counts (counts six and seven). After the district court imposed a sentence of five consecutive life terms plus 120 years,[2] Polanco filed this appeal.

## II.

Polanco contends that his convictions on the Red Top Crew counts for violating §§ 924(c) and 1959(a) (counts two and three) should be reversed because the evidence is insufficient to support a finding that Polanco murdered Cargil for the purpose of maintaining or increasing his position in the Red Top Crew. When reviewing a claim for insufficiency of the evidence, this court views "the evidence in the light most favorable to the government and ask[s] whether any rational juror could have reached a finding of guilt beyond a reasonable doubt." *United States v. Eltayib*, 88 F.3d 157, 171 (2d Cir.), *cert, denied*, 117 S. Ct. 619 (1996). "An appellant challenging the sufficiency of the evidence bears a very heavy burden," and a "jury's verdict will be sustained if there is substantial evidence to support it." *United States v. Casamento*, 887 F.2d 1141, 1156 (2d Cir. 1989).

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[2] Polanco received consecutive life sentences on counts one, two, four, eight, and nine; a consecutive ten-year sentence on count five; consecutive twenty-year sentences on counts ten through thirteen; and a consecutive thirty-year sentence on count three.

We agree that the evidence is insufficient to support Polanco's convictions on the Red Top Crew counts. Count two was premised on 18 U.S.C. § 1959(a), which proscribes committing murder "as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity. . . ." 18 U.S.C. § 1959(a). The government specifically indicted and prosecuted Polanco on the theory that Polanco killed Cargil for the purpose of maintaining or increasing his position in the Red Top Crew. *See* Superseding Indictment ¶ 29, *reprinted in* App. at 30 (count two charging Polanco with murdering Cargil "for the purpose of maintaining and increasing [his] position in [the Red Top Crew]"); Tr. of Trial at 2527 (Mar. 5, 1997) (district court charging the jury that to convict Polanco under count two, they must find that Polanco participated in Cargil's murder "because he intended that it would help him maintain or even enhance his own position or prestige within the [Red Top Crew]").

Because the government elected to prosecute count two solely under this theory, the government bears the burden of proving:

> (1) that the [Red Top Crew] was a RICO enterprise, (2) that the enterprise was engaged in racketeering activity as defined in RICO, (3) that [Polanco] had a position in the enterprise, (4) that [Polanco] committed the alleged crime of violence, and (5) that his general purpose in so doing was to maintain or increase his position in the enterprise.

*United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992). Polanco contends that the government failed to prove that Polanco had a position in the Red Top Crew and, therefore, that Cargil's murder could not have been intended to maintain or increase his position in the Red Top Crew. The government argues that Polanco had a position in the

Red Top Crew because Polanco "supplied them weapons." Tr. of Trial at 2283 (Mar. 4, 1997); *see also* Appellee's Br. at 41. We agree with Polanco.

While § 1959(a) does not specifically define the phrase "for the purpose of . . . maintaining or increasing position in an enterprise," its legislative history indicates that this phrase was enacted specifically to complement RICO by targeting criminal enterprise "members" who commit violent crimes "as an aspect of membership" in the enterprise. *See* S.Rep. No. 225, at 306, *reprinted in* 1984 USCCAN at 3486. Accordingly, the government must establish that Polanco "committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership." *Concepcion*, 983 F.2d at 381.

In this case, it is clear that Polanco was not a member of the Red Top Crew at the time of Cargil's murder. Viewing the evidence in the light most favorable to the government, the Red Top Crew was a drug trafficking enterprise that operated independently and in a different section of New York City from the Polanco Enterprise. No witnesses testified that Polanco was a member of the Red Top Crew. The only testimony on this question came from Sepulveda, who specifically testified that there were only three different positions in the Red Top Crew: "managers and pitchers and transporters," *see* Tr. of Trial at 930 (Feb. 10, 1997), and that Polanco was *not* a member of the Red Top Crew. *See id.* at 1069. No evidence suggests that Polanco held any of these positions in the Red Top Crew. Based on the evidence introduced at trial, Polanco was not involved with the Red Top Crew's drug trafficking at all; he did not buy drugs from, sell drugs to, or distribute drugs for, the Red Top Crew. While the evidence demonstrates that Polanco sold guns to the Red Top Crew, the evidence also clearly shows that Polanco's relationship with the Red Top Crew did not exceed a vendor-vendee relationship, and that Polanco had no role in determining how or why the Red Top Crew would use the guns. *See id.* at 967 (Sepulveda testifying that he was the

person who decided "what was going to be done with" each gun purchased from Polanco) . Because Polanco was not a member of the Red Top Crew, Cargil's murder could not have been committed for the purpose of maintaining or increasing Polanco's position in the Red Top Crew.[3]

Accordingly, we reverse Polanco's conviction on count two. Because we reverse this conviction, we also reverse his derivative conviction under 18 U.S.C. § 924(c) (count three) for utilizing a machine gun to murder Cargil. The jury instructions clearly permitted a conviction on this count only if the government proved that Polanco had a position in the Red Top Crew and murdered Cargil to maintain or increase his position in the Red Top Crew, *see* Tr. of Trial at 2536 (Mar. 5, 1997), and the government failed to offer such proof.

## III.

We now address Polanco's challenges to his convictions on the Polanco Enterprise counts. Polanco contends that the district court erred in entering a judgment of conviction both for conspiracy to distribute cocaine base in violation of 21 U.S.C. § 846 (count eight) and for engaging in a CCE in violation of 21 U.S.C. § 848 (count nine). He argues that convicting him on both counts violates the Double Jeopardy

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[3] Our opinion should not be construed, however, as holding that a gun supplier to a criminal enterprise can never be prosecuted under § 1959(a) for his relationship to that enterprise. For example, it is possible that Polanco's sale of guns to the Red Top Crew might support a finding that Polanco participated in Cargil's murder for the purpose of "gaining entrance to" the Red Top Crew. 18 U.S.C. § 1959 (a). Additionally, it is possible that evidence of Polanco's driving the car during the test demonstration and repairing the machine gun so that Sepulveda could kill Cargil and Polanco could consummate the gun sale might support a finding that Polanco participated in Cargil's murder "as consideration for the receipt of . . . anything of pecuniary value" from the Red Top Crew. *Id.* Because the government did not pursue these theories at trial, however, we will not now affirm the conviction on either of these bases.

Clause of the Fifth Amendment. The government concedes this and we agree.

A conviction under both the conspiracy and the CCE statutes is unconstitutional where the alleged CCE is the same enterprise as the conspiracy. *See Rutledge v. United States*, 517 U.S. 292, 300 (1996). The alleged CCE—the Polanco Enterprise—is the same enterprise as the conspiracy, and Polanco's conviction for drug conspiracy under count eight of the indictment is vacated. However, we affirm Polanco's CCE conviction under count nine of the indictment. *See United States v. Miller*, 116 F.3d 641, 678 (2d Cir. 1997) (affirming CCE conviction despite remanding for dismissal of conspiracy conviction on Double Jeopardy grounds), *petition for cert. filed,* (U.S. Jan. 26, 1998) (No. 97-7630), *and petition for cert. filed,* (U.S. Feb. 26, 1998) (No. 97-8083).

## IV.

Polanco also contends that his RICO conviction under 18 U.S.C. § 1962(c)(count one) for operating the Polanco Enterprise should be reversed. The government prosecuted Polanco under § 1962(c), alleging that Polanco committed seven predicate racketeering acts while operating his drug and gun distribution enterprise, including murdering Rivera, murdering Cargil, attempting to murder Moreno, and distributing drugs on at least four different occasions. While not disputing the relevance of Rivera's murder and Moreno's attempted murder to the Polanco Enterprise, Polanco argues that Cargil's murder was not related to his operation of the Polanco Enterprise and, thus, could not be considered as a predicate act of the Polanco Enterprise. He also argues that the "irrelevant" evidence of Cargil's murder was unfairly prejudicial to Polanco at trial. We disagree.

Pursuant to § 1962(c), it is "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering

activity." 18 U.S.C. § 1962(c). The requisite pattern of racketeering activity may be established by demonstrating predicate acts that are related and pose a threat of continued criminal activity. *See United States v. Minicone*, 960 F.2d 1099, 1106 (2d Cir. 1992). Predicate acts "must be related to each other ('horizontal' relatedness), and they must be related to the enterprise ('vertical' relatedness)." *Id.* A predicate act is "related" to an enterprise if it is "related to the activities of that enterprise." *Id.* (quotations omitted). A predicate act is related to a different predicate act if each predicate act is related to the enterprise. *See id.* We believe that a rational jury could find that Polanco's participation in Cargil's murder was related to Polanco's RICO enterprise.

The evidence shows that Polanco, as the leader of the Polanco Enterprise, sold guns to Sepulveda and the Red Top Crew to earn money for the Polanco Enterprise and to cultivate a relationship with Sepulveda and the Red Top Crew. Polanco hoped the gun sales would persuade the Red Top Crew to join forces with his own organization and further increase his power in the Project. Thus, each machine gun sale to Sepulveda, including the sale of the machine gun used to murder Cargil, was related to Polanco's RICO enterprise.

Cargil's murder clearly was related to Polanco's sale of the machine gun to Sepulveda. Each time Polanco sold Sepulveda a machine gun, Sepulveda would first test the machine gun to make sure that it was fully automatic. Sepulveda would not pay for the machine gun unless he was satisfied that the gun was operational. During one such sale, Polanco drove Sepulveda to a highway so that Sepulveda could test the machine gun. Sepulveda tested the machine gun by attempting to shoot Cargil. When the machine gun jammed, Polanco repaired the gun so that Sepulveda could successfully shoot Cargil. A reasonable jury could easily conclude that shooting Cargil was a necessary precedent to consummating the gun sale, and that Cargil's murder was part-and-parcel of the gun sale. Accordingly, we find that Polanco's participation in Cargil's murder was related to the

weapons distribution activities of Polanco's RICO enterprise and the evidence thereof certainly was relevant to Polanco's RICO conviction.

## V.

Polanco also contends that his CCE conviction (count nine) should be reversed because the government failed to establish that the Polanco Enterprise consisted of at least five members whom Polanco supervised at the same time. We disagree.

Polanco first contends that the government must establish that he acted "in concert" with five other persons at the same time, and that evidence of five persons involved at various times does not support his CCE conviction. The Second Circuit has already rejected this argument. *See United States v. Young*, 745 F.2d 733, 747 (2d Cir. 1984); *see also United States v. Phibbs*, 999 F.2d 1053, 1084-85 (6th Cir. 1993) (noting that "[e]very circuit which has considered this argument has rejected it").

Polanco also contends that the government must identify the five people whom Polanco supervised by their full names, and that the government's identification of Polanco's supervisees only by first names or street names is insufficient. This argument ignores the fact that "[t]he CCE statute is directed against all enterprises of a certain size; the identity of those involved is irrelevant." *United States v. Markowski*, 772 F.2d 358, 364 (7th Cir. 1985). Accordingly, it "is not necessary for the government to establish in every CCE case the specific identity of all five individuals subject to the defendant's direction." *United States v. Alvarez*, 860 F.2d 801, 817 (7th Cir. 1988), *aff'd in relevant part on reh'g sub nom. United States v. Holguin*, 868 F.2d 201 (7th Cir. 1989). Rather, the government need only "submit sufficient evidence to permit a rational jury to conclude that each of those [partially identified] individuals had been directed by the defendant." *Id.*; *see also United States v. Walker*, 912 F. Supp. 655, 662 (N.D.N.Y. 1996) (merely identifying

supervisees by names of "Barney" and "Petey" is sufficient to support a CCE conviction because "[w]hile both individuals are somewhat sketchily identified there appears to be no indication that either is actually one of the other low-level sellers already identified as a CCE participant"), *aff'd in part, rev'd in part on other grounds*, Nos. 96-1544, 96-1545, 96-1546, 1998 WL 174606 (2d Cir. Apr. 15, 1998). In this case, there is abundant testimony indicating that Polanco supervised Michael Rivera, Stephen Almodoval, David Sanchez, Richard Mineo, Richard Mineo's brother "TK," Carmen Castro, a person named Jonathon, a person named Milagros or Milly, and others. Accordingly, we reject Polanco's contention that the government failed to sufficiently identify five persons whom he supervised in the CCE.

## VI.

Polanco also appeals the sentence imposed by the district court on the Polanco Enterprise counts. Polanco contends that receiving consecutive sentences for his RICO conviction under 18 U.S.C. § 1962(c) and for his convictions under 18 U.S.C. § 1959 for murdering Rivera and attempting to murder Moreno for the purpose of maintaining or increasing his position in the Polanco Enterprise, which were also charged as predicate acts in the RICO count, violates the Double Jeopardy Clause. We disagree.

"It is well settled that Congress sought to permit cumulative sentences for a RICO conviction and the predicate offenses upon which the RICO violation is premised." *United States v. Walsh*, 700 F.2d 846, 856 (2d Cir. 1983). Moreover, the Second Circuit has already held that the government may prosecute a defendant both under RICO for engaging in a pattern of racketeering activity and also under § 1959 for violent crimes intended to maintain or increase the defendant's position in the RICO enterprise. *See Concepcion*, 983 F.2d at 381. Accordingly, the district court did not err by imposing consecutive sentences for Polanco's

RICO conviction and his substantive § 1959 convictions. *See Walsh*, 700 F.2d at 856 ("[W]here Congress has made sufficiently clear its intention to impose multiple punishments for the same act, imposition of such punishment is constitutional.").

## VII.

Polanco raises numerous other issues in this appeal. Polanco contends that the indictment was multiplicitous, that prosecutor misconduct required a mistrial, that the district court erred in denying his request for a bill of particulars, and that the district court erred in removing a juror. After carefully reviewing the record, we determine that each of the arguments is meritless under the established law of the Second Circuit and does not require discussion. *See Casamento*, 887 F.2d at 1191 (refusing to discuss meritless arguments).

## VIII.

For the foregoing reasons, we REVERSE Raymond Polanco's convictions and sentences on counts two and three, VACATE Polanco's conviction on count eight, and AFFIRM the convictions and sentences in all other respects.